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TRIPLE EQUITY SDN BHD & ANOR v. GOLDEN SUCCESS PROPERTY SDN BHD

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COURT OF APPEAL, PUTRAJAYA
ZALEHA YUSOF JCA
YAACOB MD SAM JCA
LAU BEE LAN JCA
[CIVIL APPEAL NO: B-02(NCVC)(W)-416-02-2018]
13 JANUARY 2023

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Abstract – *A declaration is a discretionary power relief sought only when the plaintiff does not know his rights and needs a judicial determination. It is not available to a person who has wronged or taken a step in asserting his rights and trying to regularise his rights by seeking an order of court. The court will not grant a declaratory judgment where adequate alternative remedy is available.*

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LAND LAW: *Strata title – Maintenance charges – Non-payment and refusal of payment by purchaser – Purchaser purchased units of shop lots – Purchaser required to settle arrears for maintenance to joint management body in order to collect strata titles – Whether stratified development – Whether units sold as individual title shop lots – Whether there were common facilities – Whether developer solely liable to joint management body for all maintenance charges – Whether developer shall pay all maintenance charges to joint management body – Strata Management Act 2013, s. 25*

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CONTRACT: *Agreement – Sale and purchase agreement – Purchaser purchased units of shop lots – Purchaser required to settle arrears for maintenance to joint management body in order to collect strata titles – Whether stratified development – Whether units sold as individual title shop lots – Whether there was misrepresentation and fraud – Whether declaratory reliefs sought by purchaser correct – Whether purchaser had alternative remedies – Contracts Act 1950*

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The first appellant was the developer of a project ('Putra Walk') while the second appellant was the joint management body ('JMB') of Putra Walk. The second respondent had entered into two separate sale and purchase agreements ('SPAs') with the first appellant for the purchase of two units of shop lots. The first appellant issued a notice to the respondent, requesting the latter to collect vacant possession and the keys to both units. The second appellant issued a notice to the parcel owners/occupiers, informing them of maintenance charges which would be determined in proportion to the allocated share units. As at 28 August 2012, the sums outstanding and owing by the respondent to the second appellant were RM27,058.37 and RM27,085.79, respectively. At the time of the execution of the SPA, there

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was no approval from the relevant authority as to whether strata title or individual title would be issued for the development. The development of Putra Walk was later approved by the relevant authority as stratified development. The Commissioner of Building had informed the respondent to make payments for the maintenance and management of the common property. The respondent wrote to Majlis Perbandaran Subang Jaya ('MPSJ') for an explanation over the maintenance charges. MPSJ replied to the respondent that the Putra Walk development was under a stratified development and all parcel owners were subject to s. 25 of the Strata Management Act 2013 ('Act') and must pay maintenance charges and contribute to the sinking fund in respect of his parcel to the JMB. The first appellant later notified the respondent that the strata titles for both units had been obtained and, in order to collect the strata titles, the respondent had to settle any arrears for maintenance to the second appellant. The respondent commenced an action at the High Court seeking declarations and reliefs in relation to the two units, in that: (i) they were sold as individual title shop lots, pursuant to the SPAs; (ii) there were no common facilities; (iii) the first appellant was solely liable to the second appellant for all maintenance charges; (iv) the first appellant shall pay all maintenance charges to the second appellant; and (v) the first and/or second appellant to hand over the documents of strata title issued to the respondent. The High Court allowed the respondent's claim. Hence, the present appeal. The issues that arose for adjudication were: (i) whether the declaratory reliefs sought by the respondent was wrong and tantamount to abuse of court process; (ii) whether the respondent was guilty of laches and was time-barred; and (iii) whether the second appellant could collect maintenance charges under the Act when both SPAs entered by the first appellant and the respondent did not provide for it.

Held (allowing appeal with costs)
Per Yaacob Md Sam JCA delivering the judgment of the court:

(1) In its statement of claim ('SOC'), the respondent took the position that they want the delivery of the strata titles for the two units, not individual titles. The respondent was not seeking any order to rectify the strata titles into individual title. At prayer 35(vi) of the SOC, the respondent sought that '(iv) That the first and/or second defendant hand over the documents of strata titles issued in respect of the plaintiff's two units to the plaintiff forthwith.' This simply meant that the respondent accepted the fact that its units were under strata title. The respondent refused to pay maintenance charges despite having taken a step in asserting its rights for damages against the first appellant, accepted and demanded for the strata titles for the two units, acknowledged that maintenance charges must be paid to the second appellant and having benefited the

services provided by the second appellant. The respondent alleged that there was misrepresentation and fraud committed by the first appellant. However, the respondent in the main reliefs sought to keep the two units. Clearly, the respondent had adopted two inconsistent positions. They could not have the best of both worlds and to approbate and reprobate. (paras 32 & 37)

(2) The prayer sought by the respondent under prayer (i) of para. 35 was academic because of the position taken by the respondent that it demanded the two strata titles and not individual titles as sought in prayer (vi) or para. 35. The declaratory reliefs sought by the respondent was wrong as the respondent had other remedies *id est* to repudiate the SPAs and pray for damages. The remedy for misrepresentation and fraud was to terminate the contract. The declaration sought by the respondent ought to be refused. The declaratory reliefs sought by the respondent could not be granted as there was adequate alternative remedy available under the Contracts Act 1950. (paras 39, 40 & 42)

(3) The second appellant was incorporated on 13 August 2011 and the first invoice for maintenance charges was served on the respondent on 1 January 2012. The respondent, having received the invoice from the second appellant, had notified the first appellant for an explanation but no response was forthcoming. Having received no feedback from the first appellant, the respondent wrote to MPSJ for further information on the development. On 22 October 2015, MPSJ informed the respondent that the planning permission applied for by the first appellant was for a strata development. This was the first time the respondent knew of the actual state of the development and the first appellant's breach. This was not a case where limitation had set against the respondent. (para 46)

(4) The trial judge was essentially exempting a certain proprietor, in this case the respondent, from paying the maintenance charges or making contributions to the maintenance fund of common area which was managed by the second appellant as the JMB. This was not what the Act envisaged and such a finding ran counter to the Act. The finding of the trial judge was plainly wrong. (para 49)

Case(s) referred to:

Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal [1999] 3 CLJ 231 CA ***(dist)***

Brett Andrew Macnamara v. Kam Lee Kuan [2007] 1 LNS 521 HC ***(refd)***

Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals [2012] 2 CLJ 16 CA ***(refd)***

Ho Hup Construction Company Bhd v. Woo Thin Choy [2015] 9 CLJ 706 CA ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

KNK Development Sdn Bhd & Ors v. Sumbangan Aneka Sdn Bhd [2019] 10 CLJ 822 CA ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Lembaga Lebuhraya Malaysia v. Cahaya Baru Development Bhd [2010] 4 CLJ 419 CA ***(refd)***
Norsitah Ottoh & Ors v. Rosinah Nasry & Ors [2018] 1 LNS 1585 CA ***(refd)***
Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham [1998] 4 CLJ 812 CA ***(refd)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

Legislation referred to:
Specific Relief Act 1950, s. 41
Strata Management Act 2013, s. 25

For the 1st appellant - Mohammad Fairuz Ahmad Yusof & Dir Kheizwan Kamarudin; M/s Manjit Singh Sachdev, Mohammad Radzi & Partners
For the 2nd appellant - Puthan Perumal; M/s Nanthakumar & Co
For the respondent - Eric Clement; M/s Abd Halim Ushah & Assocs

[Editor's note: For the High Court judgment, please see Golden Success Property Sdn Bhd v. Triple Equity Sdn Bhd & Anor [2018] 1 LNS 873 (overruled).]

Reported by Najib Tamby

JUDGMENT

Yaacob Md Sam JCA:

[1] This is an appeal by the appellants against the decision of the High Court allowing the respondent's claim with costs of RM30,000 against the first appellant and RM10,000 as against the second appellant.

[2] The reliefs sought by the respondent against the appellants which was granted by the High Court are for the following orders as stated in para. 35 of the statement of claim, as follows (pp. 57 to 59 of records of appeal jilid 1):

(i) a declaration that the two units of shop lots known as Units A-2 and A-3 Putra Walk, Taman Pinggiran Putra, Bandar Putra Permai, 43300 Seri Kembangan, Selangor Darul Ehsan of Putra Walk at Bandar Putra Permai were sold as 'individual titled' shop lots pursuant to their respective sales and purchase agreement both dated 16 January 2007;

(ii) a declaration that there are no common facilities in respect of the two units of shop lots known as Units A-2 and A-3 Putra Walk, Taman Pinggiran Putra, Bandar Putra Permai, 43300 Seri Kembangan, Selangor Darul Ehsan of Putra Walk at Bandar Putra Permai pursuant to their respective sales and purchase agreement both dated 16 January 2007;

(iii) a declaration that the first appellant is solely liable to the second appellant for all maintenance charges of Units A-2 and A-3 Putra Walk, Taman Pinggiran Putra, Bandar Putra Permai, 43300 Seri Kembangan, Selangor Darul Ehsan of Putra Walk at Bandar Putra Permai;

(iv) the first appellant shall pay all maintenance charges in respect of both said units to the second appellant;

(v) that the first and/or the second appellant hand over the documents of strata title issued in respect of the respondent's two units to the respondent forthwith.

[3] The appellants are the first and second defendants whilst the respondent is the plaintiff in the court below. Dissatisfied, the appellants now appealed against the granting of the declarations.

[4] Having considered the submissions of the respective counsels and having perused the records of appeal before us, we unanimously allowed the appeal of the first and second appellants with costs in the sum of RM30,000 to the first appellant and RM15,000 to the second appellant subject to the payment of allocator.

[5] We now set out the reasons for our decision. Our decision was based on the issue raised and argued before us during the hearing of the appeal.

Backgrounds Facts

[6] The first appellant is the developer for a project known as "Putra Walk Bandar Putra Permai" (Putra Walk). The development of Putra Walk consists of nine blocks known as Block A to Block I.

[7] The second appellant is the joint management body of Putra Walk. The second appellant was incorporated on 13 August 2011.

[8] The respondent entered into two separate sale and purchase agreements (SPAs) dated 16 January 2007 with the first appellant for purchase of two units of shop lots, known as Unit A-2 and Unit A-3 Putra Walk for a sum of RM678,000 each. The respondent's two units are located at Block A.

[9] On 17 December 2009, the first appellant issued a notice to the respondent requesting the respondent to collect vacant possession and the keys to both units.

[10] On 4 April 2012, the second appellant through its appointed property manager Procon Management Services Sdn Bhd issued a notice 3/2012 to all parcel owners/occupiers of Block A, B and C informing of the charging of maintenance charges with effect from 1 January 2012 which will be determined in proportion to the allocated share units. As at 28 August 2012, the outstanding sum and owing by the respondent to the second appellant are RM27,058.37 for Unit A-2 and RM27,085.79 for Unit A-3.

[11] The respondent objected to the demand for maintenance charges and emphasised their Units A-2 and A-3 were individual titled units.

[12] At the time of the execution of the SPA, there was no approval from the relevant authority as to whether strata title or individual title would be issued for the development. The development of Putra Walk was later approved by the relevant authority as stratified development.

[13] The Commissioner of Building (COB) *vide* a letter dated 28 August 2012 had informed the respondent to make payments for maintenance and management of the common property. The respondent *vide* a letter dated 30 September 2014 wrote to Majlis Perbandaran Subang Jaya (MPSJ) for an explanation over the maintenance charges.

[14] MPSJ *vide* a letter dated 22 October 2015, replied to the respondent that Putra Walk development was under a stratified development, and all parcel owners at Putra Walk are subject to s. 25 of the Strata Management Act 2013 (Act 757) and must pay maintenance charges and contribute to the sinking fund in respect of his parcel to the joint management body.

[15] On 15 August 2016, the first appellant notified the respondent that the strata titles has been officially obtained to both units and to collect the same from an appointed solicitor. The respondent was also notified that in order to collect the said strata titles they would have to settle any arrears for maintenance to the second appellant.

The Respondent's Case

[16] The respondent's cause of action was based on alleged misrepresentation and fraud by the first appellant. The respondent contends that the first appellant had purportedly misrepresented to them that the two units were to be held under individual titles, and had come to know at a later stage that the two units were held under strata title. They further contend that the second appellant had no legal authority or legal right to issue invoices or demand for maintenance charges. They further contend that any maintenance charges by the second appellant as a joint management body, should be indemnified by the first appellant as a result of the first appellant's purported misrepresentation.

Issues

[17] Before us, the first appellant argued on two issues:

(i) declaratory reliefs sought by the respondent under s. 41 of the Specific Relief Act 1950 is wrong and tantamount to abuse of process of the court; and

(ii) the respondent is guilty of laches and is time-barred.

[18] As for the second appellant, the sole issue is whether the second appellant could collect maintenance charges under the Strata Management Act 2013 when both SPAs entered by the first appellant and respondent did not provide for it.

Our Decision

Declaratory Reliefs Sought By The Respondent Under Section 41 Of The Specific Relief Act 1950

[19] Learned counsel for the first appellant argued that the respondent is relying on the cause of action of misrepresentation and fraud. As a result of the first appellant's purported breach the respondent has suffered damages. Thus, the learned High Court Judge had erred in allowing the respondent's claim as the reliefs sought are declaratory in nature.

[20] It was the first appellant's contention that the respondent is alleging breaches of the agreements by the first appellant for failure to provide individual titles for two units. If there is any breach of contractual terms of the SPA, the available remedy lies within the Contracts Act 1950 (which the first appellant denies of having committed and breach of the SPA). Thus, respondent's action for a declaration under s. 41 of the Specific Relief Act 1950 is an abuse of process of court.

[21] The first appellant also argued that prior to the signing of the SPAs for the two units, the respondent has inspected, approved and accepted the contents of the agreements. The first appellant further contents that the respondent has agreed that the agreements were subject to changes, amendments, alterations or modifications as may be deemed expedient or necessary by the first appellant or required or approved by the appropriate authorities. This was confirmed in the preamble 10 of the agreements, as follows:

> 10. The layout Plan, the Building Plans and a copy of this Agreement have been made available for the inspection of the Purchaser and the Purchased hereby acknowledges that he has inspected and has approved and accepted the same and shall be deemed to have done so prior to the execution of this Agreement, subject to such changes, amendments, alterations or modifications as may be deemed expedient or necessary by the Vendor or required and approved by the Appropriate Authority.

[22] Further, learned counsel for the first appellant argued that there is nothing in the agreements which require the first appellant to notify the respondent on the first appellant's application to the authorities whether it is for individual or stratified title. At the time of the execution of the SPA, there was no approval or confirmation from the relevant authority as to whether strata title or individual title would be issued for the two units. It was further contended that cls. 13, 15.1, 16.1 and 16.2 clearly state that the title could be a stratified title or individual title.

[23] Learned counsel also cited the Court of Appeal case in *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham* [1998] 4 CLJ 812; *Lembaga Lebuhraya Malaysia v. Cahaya Baru Development Bhd* [2010] 4 CLJ 419; and High Court case in *Brett Andrew Macnamara v. Kam Lee Kuan* [2007] 1 LNS 521; [2008] 2 MLJ 450 to support his argument.

[24] Learned counsel for the respondent on the other hand argued that the respondent is entitled to the declarations as the first appellant was in breach of the agreements. The respondent further contended that the court may make binding declarations of right whether or not consequential relief is or could be claimed. It was further argued that the court's jurisdiction to make a declaratory order is unlimited. Learned counsel cited the Court of Appeal case in *Norsitah Ottoh & Ors v. Rosinah Nasry & Ors* [2018] 1 LNS 1585; and *Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal* [1999] 3 CLJ 231 to support his argument.

[25] In allowing the respondent's claim, the learned High Court Judge in para. 39 of his grounds of judgment had stated the following:

> [39] On the peculiar facts of this case, as the issues in dispute involve question of law and interpretation of the Agreement, the relief of declaration to pronounce on the rights of contracting parties in law and on the facts is an appropriate and necessary relief that should bind all parties concerned.

[26] As alluded earlier, the learned High Court Judge had granted the respondent the following reliefs:

(i) a declaration that the two units of shop lots known as Units A-2 and A-3 Putra Walk, Taman Pinggiran Putra, Bandar Putra Permai, 43300 Seri Kembangan, Selangor Darul Ehsan of Putra Walk at Bandar Putra Permai were sold as 'individual titled' shop lots pursuant to their respective sales and purchase agreement both dated 16 January 2007;

(ii) a declaration that there are no common facilities is respect of the two units of shop lots known as Units A-2 and A-3 Putra Walk, Taman Pinggiran Putra, Bandar Putra Permai, 43300 Seri Kembangan, Selangor Darul Ehsan of Putra Walk at Bandar Putra Permai pursuant to their respective sales and purchase agreement both dated 16 January 2007;

(iii) a declaration that the first appellant is solely liable to the second appellant for all maintenance charges of Units A-2 and A-3 Putra Walk, Taman Pinggiran Putra, Bandar Putra Permai, 43300 Seri Kembangan, Selangor Darul Ehsan of Putra Walk at Bandar Putra Permai;

(iv) the first appellant shall pay all maintenance charges in respect of both said units to the second appellant;

(v) that the first and/or the second appellant hand over the documents of strata title issued in respect of the respondent's two units to the respondent forthwith.

[27] The Court of Appeal in the case of *KNK Development Sdn Bhd & Ors v. Sumbangan Aneka Sdn Bhd* [2019] 10 CLJ 822; [2018] MLJU 1281 had stated:

> [5] It is trite that declaration is a discretionary relief. It is only sought when the plaintiff does not know his right and needs a judicial determination. It is not available to a person who has already done wrong or taken a step asserting his rights and trying to regularise his rights by seeking an order of court. The court as a general rule, ought not entertain a declaratory prayer in such instances. If the claim of the plaintiff is for breach of contract, then the plaintiff should just set out the breach and seek damages or other reliefs and not declaration. In our view, the court ought not have granted the declaration. Support for the proposition is found in a number of cases. To name a few are as follows:
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> (i) In *Amalan Tepat Sdn Bhd v. Panflex Sdn Bhd* [2011] 7 CLJ 121, the Federal Court asserted:
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> > As declaration was the main prayer of the respondent, it is a rule of practice that before such relief is granted there must be evidential basis to do so. Courts are very slow in granting declaratory prayers without any evidence and argument advanced. It is a rule of practice that 'the court does not make declaration of rights either on admission or in default of pleading' (*Gan Boon Kyee v. Yap Hong Sin & Anor*; *Pattern v. Burke Publishing Co*).
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> (ii) In *Zulkiflee bin Abdul Samad & Ors v. Segi Objektif (M) Sdn Bhd* [2016] 1 LNS 1488, the Court of Appeal observed:
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> > In the instant case, the plaintiffs are seeking various declaratory reliefs. Declaratory relief is a discretionary in nature. To succeed in declaratory reliefs, the plaintiffs must come with clean hands as well as there should not be delay or collateral purpose. The findings of the learned judge on these issues were detrimental to the plaintiffs and would deprive them of the prayers they sought. It is well established that:
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> > (i) declaratory prayers are discretionary in nature and granted sparingly and judicially with regard to all the circumstances of the case and that a court will not make a declaratory judgment where the question is purely academic or to cause delay;
> >
> > (ii) to qualify for declaration, the plaintiff must not only show it is inequitable for the court to grant but also it is not contrary to the accepted principle upon which the court exercises its discretion;

(iii) declaratory prayers ought not be granted if all necessary and interested parties are not before the court. [*See Low Kum Yoon v. Teh Kim Huah* [1979] 1 MLJ 83; *Tengku Jaffar bin Tengku Ahmad v. Karpal Singh* [1993] 3 MLJ 156; *Sabu Development Sdn Bhd v. Kelik Anak Bayel* [2007] 9 MLJ 475]. In *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham [Executor of the Estate of Loo Cheng Ghee]* [1998] 4 CLJ 812; [1999] 2 MLR 1235.

(iii) In *Ahmad Nadrin bin Abd Halim & Anor v. Allianz General Insurance Co (M) Bhd* [2015] 6 MLJ 223, the Court of Appeal observed:

> It is trite that the declaratory relief are discretionary relief. If the court finds it will be unjust on the facts and circumstances to grant the declaration it may refuse the declaration.

[28] The Court of Appeal in *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham* (*supra*) held that:

> [2] The remedy of declaration is discretionary in nature. Although s. 41 of the Specific Relief Act 1950 is not a complete code upon the subject of declaratory decrees and the power to make a declaration is almost unlimited, yet, the remedy of declaration may be refused upon settled principles. Generally, **the court will not grant a declaratory judgment where an adequate alternative remedy is available** or upon hypothetical issues or upon an issue of no practical consequence or where it may be premature to grant a declaration or where a plaintiff is guilty of laches or other inequitable conduct or where a 'cloaked declaration', that is to say, a declaration for collateral purpose or with an improper motives, is sought. This list is by no means exhaustive. It merely demonstrates the wide variety of circumstances in which declaratory relief may be denied in the exercise of discretion. (emphasis added)

[29] Coming back to the instant appeal. At prayer 35(v) of the statement of claim, the respondent prayed for an order that "(v) That the first defendant (first appellant) pay as special damages a sum of RM190,008 to the plaintiff (the respondent)". Thus, the respondent has taken position that they have suffered damages as a result of the first appellant's purported breach of the agreements and therefore asking for damages on purported overpayment of RM95,004 on each unit amounting to RM190,008. The learned High Court Judge dismissed the respondent's claim for the special damages. In para. [40] of His Lordship's grounds of judgment, he stated as follows:

> [40] As for the Special Damages, this claim has to be strictly proved. For the purchase price of the 2 units in question, it was strictly based on the SPAs agreed to by both parties on which the present claim is grounded Comparison with the price offered for the other units in other blocks does not amount to strict proof of damages suffered by P in view of the agreed price and other factors involved being different. I, therefore, find that the various items of SD as claimed have not been strictly proved and have to be dismissed.

[30] It is undisputed facts that the second appellant had provided the following services for Block A, B and C of Putra Walk:

(i) engaged security guards to patrol and surveillance around the blocks, including Block A, B and C;

(ii) engaged landscapers to take care the landscaping, including periodic grass cutting and trimming in front of Block A, B and C;

(iii) engaged cleaners to take care the cleanliness of the corridor and the car park at Block A, B and C.

[31] The site supervisor for the second appellant, Mr Mohantas a/l P Sanniah (SD4) testified that there are common properties built for Putra Walk which are amongst others the walkway, corridors, veranda, car park, roof, staircase and Putra Walk Arch. SD4 also gave evidence that the second appellant have engaged services for cleaning, security guards and maintaining the landscape and paid insurance for the buildings and other maintenance services for Putra Walk.

[32] In the statement of claim, the respondent has taken the position that they want delivery up of the strata titles for the two units, not individual titles which they purportedly led to believe. It is clear that the respondent is not seeking any order to rectify the strata titles into individual title. At prayer 35(vi) of the statement of claim, the respondent sought that "(iv) That the first and/or second defendant hand over the documents of strata titles issued in respect of the plaintiff's two units to the plaintiff forthwith." This is simply means that they have accepted the fact that their units are under strata title. Having taken a step in asserting their rights for damages against the first appellant, accepted and demand for the strata titles for the two units, acknowledgement that maintenance charges must be paid to the second appellant and having benefited the services provided by the second appellant, yet, the respondent refuses to pay maintenance charges.

[33] At the hearing of the suit before the trial judge, it was argued for the respondent that the first appellant was in breach of cl. 7 of the SPAs for failure to apply for individual title as required under said cl. 7. The said clause provides as follows:

> Clause 7:
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> The Vendor (first appellant) shall apply to the Appropriate Authority for the approval of building plans (hereinafter referred to as 'the Buildings Plans') in relation to the Project (as hereinafter defined) and the Vendor (first appellant) shall apply for the subdivision of the said Land in accordance with the approved Layout Plan for the issuance of individual titles thereto.

[34] The learned trial judge accepted the respondent's argument. The learned High Court Judge's findings that the first appellant had breached the terms of the SPAs is found in para. 34 of the grounds of judgment as follows:

> [34] On the facts and in law, Plaintiff ('P') have proved on balance of probabilities that the first defendant ('D1') who although from the beginning intended the whole development of Putra Walk ('PW') to be a stratified development deliberately and agreed to provide P individual titled units for the units that the purchased, which is binding and effective on both P and D1 as reflected in the sale and purchase agreements ('SPA') entered into. I agree with P's contention that D1 had breached the terms of the SPAs by applying to the State Authority ('PTG') to designate the said development as a stratified development within 4 months thereafter. This was wrongful and unlawful as P had not been given due notice of the charge as the lawful purchaser.

[35] Learned counsel for the respondent submitted that the learned High Court Judge was correct in granting the declaratory reliefs sought by the respondent. He cited the Court of Appeal case in *Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal* (*supra*). The plaintiff purchaser claimed that he had entered into a sale and purchase agreement with the defendant in respect of an apartment building based on the defendant's fraudulent misrepresentation. The High Court dismissed the claim but on appeal the Federal Court set aside the agreement and ordered the defendant to, *inter alia*, refund the purchase price with interest thereon and pay damages to be assessed by the High Court. The Senior Assistant Registrar assessed damages at: (i) RM46,000 for loss of value of appreciation of the property; (ii) RM5,999 for loss of value of appreciation of the club membership of the property; (iii) RM142,240.22 being interest paid by the plaintiff to the bank; (iv) RM72,790.10 being interest at 8% p.a on the said interest; and (v) RM5,500 for a valuation report on the property. The plaintiff's claim for loss of rent which he alleged he would have received had the transaction been completed was disallowed. Both parties appealed against the SAR's decision but the judge in chambers dismissed them. Before the Court of Appeal, the issue which arose for decision was: what measure of damages was the plaintiff entitled to recover consequent upon obtaining a decree of rescission of the agreement he had with the appellant?

[36] In this regard, we agreed with counsel for the first appellant and the second appellant that *Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd*'s case can be distinguished on the ground that Federal Court ordered was a rescission of contract on the basis of fraudulent misrepresentation.

[37] The respondent alleged that there was misrepresentation and fraud committed by the first appellant. However, the respondent in the main reliefs sought to keep the two units. Clearly the respondent had adopted two inconsistent positions. They could not have the best of both worlds and to approbate and reprobate.

[38] The Court of Appeal in the case of *Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals* [2012] 2 CLJ 16, held that:

> [105] We categorically say that the liquidator cannot blow hot and cold to suit him whenever he feels like it. He cannot approbate and reprobate in the same breath. On the one hand, he claims that the High Court order dated 26 July overrides or displaces a statute which render the said order invalid and yet he has the audacity to continue to act as a liquidator by virtue of the said order. In the words of Sir Nicholas Browne-Wilkinson VC in *Express Newspapers Plc v. News (UK) Ltd And Others* [1990] 3 All ER 376, at pp. 383 to 384:
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> > There is a principle of law of general application that is not possible to approbate and reprobate. *That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance*. (emphasis added)

[39] It is trite that declaration is a discretionary power relief. It is only sought when the plaintiff does not know his right and needs a judicial determination. It is not available to a person who has already done wrong or taken a step asserting his rights and trying to regularise his rights by seeking an order of court. The court will not grant a declaratory judgment where adequate alternative remedy is available. Before us it was argued for the first appellant that the declaration was wrongly given because an alternative remedy existed. Furthermore, the declaratory reliefs sought are contradicting one another. Prayer (i) of para. 35 of the statement of claim which seeks for declaration that the respondent's two units were sold as individual titles units contradicts prayers (iii) and (iv) of para. 35 of the statement of claim which acknowledges maintenance charges payable to the second appellant and in the same breath the acceptance of strata titles. In our judgment, the prayer sought by the respondent under prayer (i) of para. 35 becomes academic because of the position taken by the respondent that it demands the two strata titles and not individual titles as sought at prayer (vi) or para. 35.

[40] We thus agree with the appellants that the declaratory reliefs sought by the respondent is wrong as the respondent has other remedies *id est* to repudiate the SPAs and pray for damages as was held by the Federal Court in the case of *Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal* (*supra*). If there was a breach of any contractual terms of the SPAs, the available remedy lies within the Contracts Act 1950. The remedy for misrepresentation and fraud is to terminate the contract.

[41] In *Law of Contract*, 4th edn, Dato' Seri Visu Sinnadurai referred to *Treitel, in The Law of Contract* (12th edn) at paras. 18 to 48 which summarises:

> Are there three categories of terms? ... The general rule is that there are three classes of contractual terms: conditions; the breach of which at common law invariably give rise to a right to terminate, warranties, the breach of which give rise only to a right to damages; and intermediate terms, the breach of which give rise to a right to terminate if it sufficiently serious but otherwise sounds only in damages.

[42] Applying what we apprehend to be settled law to the facts of the present case, we are compelled to the conclusion that the declaration sought by the respondent ought to be refused. The declaratory reliefs sought by the respondent could not be granted as there is adequate alternative remedy available under the Contracts Act 1950.

Whether The Respondent's Is Guilty Of Laches And The Claim Is Time-Barred

[43] Learned counsel for the first appellant argued that the respondent is not entitled for declaratory reliefs as the respondent is guilty of conduct of laches. It was submitted that the respondent had known the alleged misrepresentation and/or fraud since 17 December 2009. SP1, the director of the respondent, under cross-examination testified that he came to know about the maintenance charges in December 2009. The writ was filed on 21 December 2006. Alternatively, learned counsel for the first appellant further argued that the respondent's claim is barred by limitation. At para. 12 of the first and second appellants' statement of defence, limitation is relied upon as alternative defence to the claim.

[44] Learned counsel for the respondent in his short reply contended that the breach committed by the first appellant is still subsisting, *ie*, to hand over an individual titles of the two units to the respondent. The respondent also being served by the second appellant with maintenance charges/bills till to date.

[45] In *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham* (*supra*), the Court of Appeal held (at p. 825):

> Further, it is well established that limitation is merely a defence to an action. It assumes the existence of a cause of action and does not create one. For, as pointed out by Sir Richard Couch, when delivering the advice of the Board of the Privy Council in *Hari Nath Chatterjee v. Mothurmohun Goswami* [1894] ILR 21 Cal. 8, at p. 18 (PC): "The intention of law of limitation is, not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right." Further, the defence of limitation cannot be relied upon unless specifically pleaded. (See, s. 4 of the Limitation Act 1953.)

[46] Nowhere in his grounds of judgment had the learned High Court Judge addressed his mind upon this issue. However, there existed in this present appeal material on record upon which we will be able to arrive at a decision on the issue canvassed. It was a clear and undisputed fact that the second appellant was incorporated on 13 August 2011 and the first invoice for maintenance charges was served on the respondent on 1 January 2012. The respondent having received the invoice from the second appellant had notified the first appellant for an explanation but no response was forthcoming. Having received no feedback from the first appellant, the respondent wrote to MPSJ for further information on the development. *Vide* a letter dated 22 October 2015, MPSJ informed the respondent that the planning permission applied for by the first appellant was for a strata development. This was the first time the respondent knew of the actual state of the development and the first appellant's breach. Applying this background, we are of the view that the submission of the first appellant is flawed. This is not a case where limitation has set against the respondent. We agree with the respondent.

Whether The Second Appellant Could Collect Maintenance Charges

[47] Learned counsel for the second appellant submitted that since the first appellant's development is a stratified development, and the respondent's two units are part of that stratified development, as confirmed by MPSJ in their letter dated 22 October 2015, the second appellant is merely carrying out its duties and obligations under the Strata Management Act 2013 (Act 757). Counsel further argued that whatever grouses the respondent has with the first appellant for purported breach of contract, it should be taken up with the first appellant directly and not against the second appellant who are merely carrying out its statutory duties. The second appellant is duly authorised and empowered under the Act to impose and collect maintenance charges. To allow the respondent's claim would go against the provisions of the Act. Thus, it was submitted that the respondent has a legal duty to pay the charges and sinking fund imposed by the second appellant for Units A-2 and A-3 pursuant to Act 757.

[48] The learned High Court Judge in his grounds of judgment stated as follows:

> [25] In the absence of any DMC (Deed of Mutual Covenant) entered into between the parties, there was plainly no contractual obligation on the part of P (the respondent) to pay maintenance charges to D1 (first appellant).

[49] With respect we are of the view that based on his grounds of judgment, the learned trial judge is essentially exempting a certain proprietor, the respondent in this case, from paying the maintenance charges or making contribution to the maintenance fund of common area which is managed by

the second appellant as joint management body. This is not what Act 757 envisages and such a finding runs counter to Act 757. We agree with the second appellant's submission that the finding of the learned trial judge is plainly wrong.

[50] In the case of *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785, the Federal Court when addressing the primary issue of whether the Court of Appeal had erred in interfering with the findings of facts of the trial judge at p. 800 opined:

> It is well settled law that an appellate court will not generally speaking, interfere with the decision of a trial judge unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trail court is guilty of no or insufficient judicial appreciation of evidence. (See *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *Watt or Thomas v. Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309).

Conclusion

[51] For all the foregoing reasons we find there are merits in this appeal which compelled us to exercise our appellate intervention following the Federal Court in *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* (*supra*); *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 which endorsed the view of the Court of Appeal in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 and followed in *Ho Hup Construction Company Bhd v. Woo Thin Choy* [2015] 9 CLJ 706. The appeal is allowed with costs here and the court below. The declaration and other orders made by the trial judge are set aside. The respondent's action is dismissed.